Consumers Union

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Testimony of

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Before the

Senate Committee on
Commerce, Science, and Transportation

On

AOL=s Merger With Time Warner

March 2, 2000

To protect consumers= interest in the development of competitive markets for all communications services, Consumers Union believes that the Federal Trade Commission (FTC) and Federal Communications Commission (FCC) should reject or seek substantial modification of the AOL/Time Warner merger. Coming on the heels of massive consolidation in the cable television industry, the proposed merger of AOL with Time Warner poses enormous dangers for the preservation of vibrant Internet competition in a broadband environment, and threatens the emergence of broad-based competition to the cable TV industry.

This merger should not be viewed in isolation. AT&T has already purchased all of TeleCommunications Inc.=s (TCI) cable properties. If the proposed merger of AT&T with MediaOne is approved, AT&T would own about 25 percent of Time Warner Entertainment B most of Time Warner=s cable systems, plus some of its programming and studio properties. Through Time Warner=s previous merger with Turner Broadcasting Systems, AT&T already owns a nine percent Apassive@ stake

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Consumers Union, Consumer Federation of America and Media Access Project, ABreaking The Rules: AT&T=s Attempt to Buy a National Monopoly in Cable TV and Broadband Internet Services," August 17, 1999

In the Matter of Applications for Consent to the Transfer of Control of Licenses, MediaOne Group, Inc., To AT&T Corp., Applications and Public Interest Statement of AT&T and MediaOne Before the FCC, July 7, 1999; and ABreaking The Rules,@ op.cit.

Federal Trade Commission, In the Matter of Time Warner Inc., Turner Broadcasting Systems Inc., Telecommunications Inc. and Liberty Media Corp., Complaint, File No. 961-0004, Sept. 1997

in Time Warner.

These joint holdings form the basis of a tight-knit cartel that could dominate and control distribution of the broadband and television services that the vast majority of consumers want to see and use. Figure 1 illustrates the AT&T/Time Warner ownership links that, with AOL, account for:

almost two-thirds of all U.S. cable or multichannel video households;

nearly one-half of the most popular cable television stations/networks;

more than one-half of narrowband Internet users;

more than three-fourths of broadband users;

publishing of more than 10 percent of the nation=s books and 33 magazines read by 120 million people;

sale of 119 million records last year, about one-sixth of the market; and

movies produced by Warner Brothers and New Line Cinema, about one-fifth of the domestic market.

Federal Trade Commission, In the Matter of Time Warner Inc., Turner Broadcasting Systems Inc., Telecommunications Inc. and Liberty Media Corp., Complaint, File No. 961-0004, Sept. 1997

In the Matter of Annual Assessment of the Status of Competition in Markets for the delivery of Video Programming, CS Dkt. No. 99-230, Sixth Annual Report, FCC, Jan. 14, 2000

ABreaking the Rules,@ op.cit.,

Id.

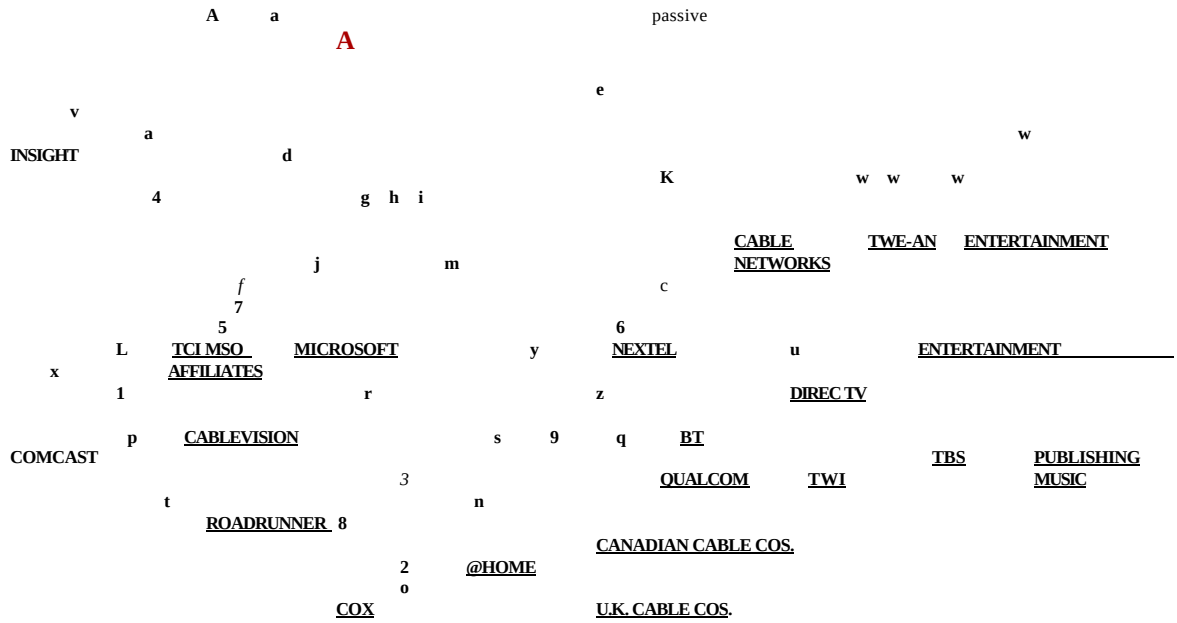
Saul Hansell, AAOL Agrees to Buy Time Warner for $165 Billion; Media Deal is Richest Merger,@ New York Times Jan. 11, 2000

Id.

Id.

FIGURE 1

THE EXPANDING BROADBAND CARTEL



LEGEND:
STOCK OWNERSHIP: MAJORITY ; MINORITY
JOINT VENTURE:
USE DEAL: EXCLUSIVE ; PREFERRED
SWEETENERS:

DESCRIPTIONS OF RELATIONSHIPS AND IDENTIFICATION OF SOURCES:

1 = $1.5 billion breakup fee (10)
2 = Large minority (12); 12% (16)
3 = Minority (6)
4= QVC Joint venture (16)
5 = Programming joint venture through Liberty (22); Investment (19)
6 = Joint venture (20)
7= TCI MSO Joint ventures (4)
8= Programming joint venture through Liberty (22)
9= Set top box joint venture (15)

a = 10% Ownership of Time Warner (23)
b = exclusive deal for telephony (6)
c =25% (6)
d = exclusive deal for telephony (5)
e = 26% (1) (16)
f = 25% (1) (4)
g = 3% ownership (3) (5)
h = up to ten million set tops guaranteed (3)
i = Majority (5); 25% (6)
j = 39% (6)
k = 25% (6)
L= Exchange of systems is likely to be consummated with a stock swap (2)
m = Microsoft gets to buy MediaOne=s European cable systems (9)
n = Windows NT in @Home solutions network (13)
o= Minority (6)
p = 11% ownership (5) (12)(17)
q = Wireless Internet (8)
r = Through Comcast (5)(12); Direct (18); 10% (16) (20)
s = 5% NTL, 30% Telewest, 30% Cable & Wireless (14)
t = Minority (5)(12)
u = small ownership (25)
v = 34% via MediaOne (1)
w = Cable systems are primarily owned in TWE; TBS is owned by Time Warner; Entertainment is split between Time Warner and TWE (24)
x = Manager of AT&T owned systems (7) (11)
y = 4% (8)

z = Wireless Internet (8)
SOURCES:

AAT&T Household Reach to be Issue in MediaOne Merger Review,@ Communications Daily, May 10, 1999.

AWar Ends: AT&T and Comcast Cozy up in Solomon-Like Deal,@ Broadband Daily, May 5, 1999.

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AFCC to Scrutinize AT&T MediaOne Deal,@ Broadband Daily, May 10, 1999.

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AT&T Chief=s $120 Billion Plan Capped by Deal for MediaOne,@ Washington Post, May 6, 1999.

AMicrosoft to Buy A Stake in Nextel,@ Washington Post, May 11, 1999.

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APact Ends MediaOne Bid War,@ Washington Post, May 6, 1999.

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AAs Worlds Collide, AT&T Grabs Power Seat,@ Wall Street Journal, May 6, 1999.

AMicrosoft, @Home Make Broadband Pact,@ ZDNet, May 13, 1999.

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Schiesel, Seth, AConcerns Raised as AT&T Pursues a New Foothold, New York Times, May 6, 1999.

Fabrikant, Geraldine and Seth Schiesel, AAT&T Is Seen Forging Link to Microsoft,@ New York Times, May 6, 1999.

Markoff, John, AMicrosoft Hunts Its Whale, the Digital Set-Top Box,@ New York Times, May 10, 19999.

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Federal Communications Commission, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CC Docket No. 98-102, Fifth Report, Table D-6.

Federal Communications Commission, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CC Docket No. 98-102, Fifth Report, Table D-1.

ATransfer of Control Application,@ Transfer of Control of FCC Licenses MediaOne Group, Inc. to AT&T Corp., July 7, 1999.

Most significantly, AOL and Time Warner are developing AOLTV -- a new generation of easy-to-use, combined television and broadband Internet access services -- that virtually no one else in the market could challenge in the foreseeable future:

> AThe service [AOLTV], expected this summer, could be "profoundly important, " says Merrill Lynch's Internet specialist Henry Blodget. If the service is a hit, the company's clout over interactive communications might become "analogous to Microsoft's control of the PC operating system."
>
> "The more ways a subscriber interacts with AOL," Blodget says, "the less likely the subscriber will be to pull up stakes and go with a different provider -- especially when the entire family has programmed the service with individual buddy lists, calendars and e-mail accounts." What wows observers is the proven appeal of the services AOLTV harnesses. AOL subscribers, now 21 million, wouldn't have to boot up their computers to access e-mail, instant messaging, chats, calendars, and online shopping or investment services.
>
> People could use them while watching, say, Who Wants to Be a Millionaire by pointing a remote or wireless keyboard at a set-top decoder that splits the screen to show online content and the TV show.
>
> Initially, people wanting AOLTV would need a special set-top box to connect the TV to a phone line.
>
> But the deal with Time Warner, the No. 1 cable operator with more than 13 million customers, opens the way for AOLTV to dominate interactive TV. It could become a seamless part of the cable TV package, eliminating the need for a separate set-top box and a phone line.

Although this particular set of services is not yet available, the unique ability to offer consumers a Apoint-and-click@ TV-based service, guided by remote control, illustrates the potential danger of allowing so much distribution capacity and content

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See Attachment A, David Lieberman, AAOL angles for TV viewers,@ USA Today, Feb. 24, 2000

to be locked up in one corporate entity.

For example, no companies have been more eloquent than AOL and AT&T at describing how other distribution technologies **B** like phone companies**:** Digital Subscriber Line (DSL) services, satellite and other wireless services (e.g., MMDS) **B** cannot offer comparable television-quality services or the interactive speed of broadband services offered over a cable wire. We provide a lengthy presentation of this persuasive argument and market analysis in Attachment B. And other independent analyses support the conclusion that these technologies will not be able to compete effectively, for the foreseeable future, with cable for mass-market consumer services that combine television with broadband Internet services.

When these technical advantages are added to enormous control of cable distribution systems in the Time Warner Afamily@ and its vast stockpile of popular television, Internet and other content services, it is obvious that the AOL/Time Warner merger could substantially harm consumer choice and drive up prices for a broad variety of cable-based services. Everyone in the television programming and broadband Internet service markets will need to reach enough Aeyeballs@ to obtain the financing and advertiser support necessary to make their services financially viable. This will require carriage on Time Warner=s and AT&T=s cable systems. If AOLTV takes off, the need for open access to cable lines for traditional online services may be dwarfed by a new combined service where the AOL brand

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Sanford C. Bernstein & Co., and McKinsey & Co., ABroadband!@ January 2000; AThe ISP Directory,@ Washington Post, Oct. 29, 1999; and David Lieberman, ABridging the Digital Divide,@ USA Today, Oct. 11, 1999

is the only Internet gateway that provides TV viewers immediate access by remote control.

Unfortunately, the FCC has failed to require nondiscriminatory open access to cable systems or effectively limit horizontal ownership of cable systems, and the Clinton Administration has taken a hands-off approach to media and communications mergers. This leaves consumers at risk of losing the market's potential to expand competition to cable TV monopolies and to preserve Internet competition using new broadband technologies. AOL's and Time Warner=s recently announced A memorandum of understanding@ does not alleviate this concern. While we commend the companies for taking a first step to outline the elements that open access would entail, their agreement is meaningless unless disputes about its terms are subject to public oversight and independent third-party enforcement.

As the quotes from AOL in Attachment B indicate, it was not long ago that AOL believed that regulation was necessary to make an open access policy work. Given that the elements of open access described in the memorandum only make sense if AOL's and AT&T's description of cable=s monopoly power in Attachment B is accurate, it is difficult to understand why these companies should be trusted to enforce a policy against their cable monopolies' financial self interest.

Therefore, Consumers Union will ask the FTC and FCC to reject the AOL/Time Warner deal unless it is significantly restructured. To prevent horizontal concentration in the cable and broadband markets, all ownership links and preferential arrangements between Time Warner and AT&T must be severed. In addition AOL should be required to divest its holdings in Time Warner=s satellite competitor, DirecTV. Finally, a nondiscriminatory open access policy with public accountability should be implemented before this merger is cleared. Such a policy must include consideration of new services that combine traditional television with new interactive broadband Internet services, to ensure that nondiscrimination principles govern an evolving marketplace.

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Consumer Federation of America

WHO DO YOU TRUST?

AOL AND AT&T **Y** WHEN THEY *CHALLENGE* THE CABLE MONOPOLY

OR

AOL AND AT&T Y. WHEN THEY *BECOME* THE CABLE MONOPOLY?

FEBRUARY 2000

COMMERCIAL INTERESTS AND PUBLIC POLICY FLIP-FLOPS

A. CHANGING POLICY POSITIONS

Before they purchased cable TV companies, both AT&T and AOL were vigorous and prominent advocates for the proposition that governments need to adopt a public policy to ensure fair competition and open access to the broadband Internet. Promptly upon the acquisition of cable wires -- the very bottleneck facilities about which they had complained so loudly -- they reversed their policies and ceased supporting a public obligation to provide open access to cable facilities. Yet, they continue to demand that open access requirements be imposed on other types of facilities that they do not own.

While this is certainly not the first policy flip-flop driven by merger and acquisition, it is unique given what AOL and AT&T are seeking from policymakers: a trust-me, hands-off approach to open access. They have made their honesty an issue by claiming that they can be trusted to do what they previously claimed could only be accomplished through public policy action. Therefore, we believe it is appropriate to scrutinize whether these companies can be simply trusted to open their cable networks to nondiscriminatory, open access for nonaffiliated internet service providers (ISPs).

If AOL and AT&T were just expressing a self-interested, but inaccurate, description of cable's monopoly power before they purchased cable properties, then how can they be "trusted" to do anything other than follow their current self-interest in exercising control over access to their cable systems? On the other hand, if their previous policy positions reflected an accurate description of the market structure and critical steps needed to ensure open access - as we believe they did - then how is it possible for the "market," as they described it, to open itself up? This paper offers a detailed description of the market structure and elements of

open access as presented to the public by AOL and AT&T before they sought to become cable companies through merger.

Based on AOL and AT&T's past assessment of the market, which we believe is

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Consumer Federation of America, Consumers Union, and Media Access Project, *Breaking the Rules: AT&T's Attempt to Buy a National Monopoly in Cable TV and Broadband Internet Service*, August 17, 1999; Consumer Federation of America, *Transforming the Information Super Highway into a Private Tool Road: The Case Against Closed Access Broadband Internet Systems*, September 20, 1999.

accurate and coincides with our own past research, how can the public trust them to do anything other than exercise the market power that they claimed cable companies possess? Why should policymakers entrust open access rules to a cable market dominated by AOL and AT&T, when those companies provided policymakers with market analysis demonstrating that openness can only be achieved through regulatory mandate?

B. INCREASING URGENCY FOR PUBLIC POLICY TO REQUIRE OPEN ACCESS

The AOL flip-flop resulting from its acquisition of Time Warner, coming on the heels of the AT&T merger with MediaOne, is a special source of concern. These transactions push the ongoing trend of concentration and consolidation in the cable TV and broadband and Internet industries to alarming new levels. To trust them to voluntarily refuse to exercise monopoly power that they previously sought government control over is like relying on a dictator to act benevolently. Their economic interests will inevitably drive them to abuse their market power.

We now face the prospect of having two huge, interconnected companies **B** AT&T and AOL **B** completely dominating the broadband landscape. First, they would own over half of all cable wires in the nation and half of the most popular cable TV programming. They would have over half of the narrowband Internet subscribers and at least three-quarters of all residential broadband Internet subscribers.

Second, the cable industry has never behaved in a competitive manner and this merger makes competition even less likely. Major cable companies never overbuild one-another=s facilities. They never compete head-to-head in the wires business and they are joint ventured up to their eyeballs in programming. The AOL-Time Warner merger creates one, interconnected set of owners of broadband service providers since AT&T owns more than 10 percent of AOL/Time Warner through MediaOne=s substantial ownership of Time Warner Entertainment. Indeed, AOL/Time Warner executives trumpeted the fact that the first call they made after announcing the merger was to AT&T CEO Michael Armstrong to offer to work together.

Consumer Federation of America, Consumers Union, and Media Access Project, *Breaking the Rules: AT&T=s Attempt to Buy a National Monopoly in Cable TV and Broadband Internet Service*, August 17, 1999; Consumer Federation of America, *Transforming the Information Super Highway into a Private Tool Road: The Case Against Closed Access Broadband Internet Systems*, September 20, 1999.

Breaking the Rules.

Breaking the Rules.

Third, AOL was being counted on by some to use its strong position in the narrowband Internet market to propel the telephone industry=s high-speed technology (Digital Subscriber Line or DSL) forward as a competitor to cable. DSL is behind cable in roll out and subscribers and has significant technological disadvantages compared to cable, including geographic coverage and bandwidth. It was hoped that AOL=s marketing and money would make this less attractive alternative a future competitor for cable, particularly in the residential sector, where DSL=s limitations are greatest. There could be no clearer vote of no confidence in DSL than AOL=s acquisition of Time Warner.

In order to allay fears about the remarkable concentration that is taking place in the industry, these companies have offered a series of explanations and claims that actual and potential competition will alleviate or prevent market power problems. When these arguments fail to quiet critics and the companies are pressed to provide better assurances, the companies insist that they can be counted on to voluntarily negotiate fair arrangements for access to their newly acquired facilities. These promises stand in sharp contrast to the statements they made before they secured a favored place on the information superhighway by purchasing exclusive rights to its most attractive high-speed lanes.

This paper demonstrates that their statement about open access before they obtained this advantage should carry special weight in informing policy makers about the demands that should be placed on them as facilities owners. The paper relies on official statements made to governmental entities by these corporations. They loudly demanded a public policy that imposes open access obligations on broadband facility owners before their commercial interests in the issue changed. The purpose of this paper is not to chastise the companies for changing positions, although it does point out the many ways in which what they now say contradicts what they said so recently. Rather, the purpose of the paper is to understand why they were so adamant to secure open access to cable facilities. There are still thousands of Internet service providers out there who have not been able to purchase their own wires, and never will be. They still need the protections that these two huge corporations demanded.

AT&T made a lengthy filing before the Canadian Radio-Television and Telecommunications Commission from the perspective of an unaffiliated content provider owning no wires in Canada. It argued strongly that an open access requirement is necessary to promote competition and ensure that unaffiliated

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AT&T Canada Long Distance Services, AComments of AT&T Canada Long Distance Services Company,@ before the *Canadian Radio-television and Telecommunications Commission*, Telecom Public Notice CRTC 96-36: Regulation of Certain Telecommunications Service Offered by Broadcast Carriers, February 4, 1997.

content providers would not be discriminated against by the owners of broadband access facilities. In the process, it provided a detailed and point-by-point refutation of every one of the arguments that AT&T, as a dominant cable operator in the United States, has made against open access.

AOL=s advocacy of a public policy requiring open access is well known and its overnight reversal of position has attracted a great deal of attention. It argued vigorously for open access at the federal level. What is less well known is the detailed description of open access that AOL offered a couple of months before it acquired Time Warner. The City of San Francisco witnessed one of the most prolonged fights over open access, supporting the concept but requiring technical, legal and economic analysis to flesh it out before it imposed a requirement. AOL, which had fought bitterly for open access in the City, answered the challenge by outlining not only the justification for open access, but a road map to the light handed requirements that would keep the broadband Internet open.

Contrast that position to AOL=s current stance. When AOL chairman Steve Case announced the merger with Time Warner, he said, AWe always hoped [open access] would come through the marketplace, rather than having to get government involved.@ Time Warner chief executive Gerald Levin said that the two companies were Agoing to take the open-access issue out of Washington, out of city hall, to the marketplace.@

Although the advocacy of AT&T and AOL for open access for cable modems for broadband Internet service are the central concern in this paper, it is important to note that these two corporations have also advocated open access for other technologies. AT&T argues for open access to telephone networks for advanced services. Its most recent statements, filed in the U.S. in late-January 2000, make especially interesting reading in light of the vigorous fight AT&T has put up against open access requirements for its cable systems.

At the federal level, AOL=s most explicit analysis of the need for open access can be found in AComments of America Online, Inc.,@ *In the Matter of Transfer of Control of FCC Licenses of MediaOne Group, Inc. to AT&T Corporation,* Federal Communications Commission, CS Docket No. 99-251, August 23, 1999 (hereafter, AOL, FCC).

America Online Inc., AOpen Access Comments of America Online, Inc.,@ before the Department of Telecommunications and Information Services, San Francisco, October 27, 1999.

Press Conference, January 10, 2000.

AComments of AT&T Corp. in Opposition to Southwestern Bell Telephone Company=s Section 271 Application for Texas,@ *In the Matter of Application of SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Texas,* Federal Communications Commission, CC Docket No. 00-4, January 31, 2000 (hereafter, AT&T SBC Comments).

The sharp reversal of position underscores the need for binding public policy, rather than vague private sector promises, to protect and promote competition in the next generation of Internet development. To put the matter bluntly, it is patently obvious that important public policies which will determine the free flow of commerce and information in the AInternet Century@ cannot be left to the whims of the commercial interests of large corporations that change their views with every merger or acquisition.

C. THE GOVERNMENT ROLE IN ENSURING OPEN ACCESS

Did these companies really advocate a role for government policy to ensure open access? There is no doubt about it.

1. AOL

While AOL always intended for private parties to implement open access by negotiating the necessary details to implement an obligation created by government action, it simply cannot hide from the critical role it felt government had to play. **AOL urged governments to make an unequivocal commitment to a comprehensive and meaningful policy of open access that clearly signaled that closed access is not acceptable. It urged San Francisco to back up that commitment by providing a private right of action and a threat of government enforcement.** AOL stated:

> The City=s critical and appropriate role is to establish and firmly embrace a meaningful open access policy, not to manage the marketplace. We believe that once such a policy is fully in place, the industry players will negotiate the details to fairly implement open access. The City thus should not have to play an active role in enforcing non-discriminatory pricing or resolving pricing disputes. Rather, the City should simply adopt and rely on a rule that a broadband provider must offer high speed Internet transport services to unaffiliated ISPs on the same rates as it offers them to itself or its affiliated ISP(s). The City=s unequivocal commitment to this policy and the resulting public spotlight should offer enforcement enough, and indeed we expect that cable operators will adjust their ways readily once they understand that a closed model for broadband Internet access will not stand. When necessary, the opportunity to seek injunction or bring a private cause of action would offer a fallback method of obtaining redress**Y**

> As stated above, the City=s role is to establish a comprehensive open access policy with an effective enforcement mechanism. Network management issues are best left to the industry players, and the City need not play a hands-on role in this area. The companies involved are in the best position to work out specific implementation issues. This is not to say, however, that a reluctant provider would not have the ability to interfere with the successful implementation of an open access regime. Accordingly, through its enforcement policy if necessary, the City should ensure that the necessary degree of cooperation is achieved. (AOL, pp. 4-5).

AOL did not have to defend the need for open access in its comments to San Francisco, since the proceeding was to implement open access requirements. It did, however, pat the city on the back for endorsing open access. As AOL put it

> AOL applauds the City for taking this critical step in the implementation of the Board of Supervisors= open access resolution, which wisely supports consumers= freedom to choose their Internet service provider and to access any content they desire B unimpeded by the cable operator. (AOL, p. 1).

AOL also offered its arguments for open access in the FCC=s proceeding overseeing the AT&T/MediaOne merger.

> What this merger does offer, however, is the means for a newly ARBOC-icized@ cable industry reinforced by interlocking ownership relationships to (1) prevent Internet-based challenge to cable=s core video offerings; (2) leverage its control over essential video facilities into broadband Internet access services; (3) extends it control over cable Internet access services into broadband cable Internet content; (4) seek to establish itself as the A electronic national gateway@ for the full and growing range of cable communications services.

> To avoid such detrimental results for consumers, the Commission can act to ensure that broadband develops into a communications path that is as accessible and diverse as narrowband. Just as the Commission has often acted to maintain the openness of other late-mile infrastructure, here too it should adopt open cable Internet access as a competitive safeguard B a check against cable=s extension of market power over facilities that were first secured through government protection and now, in their broadband from, are being leveraged into cable Internet markets. Affording high-speed Internet subscribers with an effective means to obtain the full range of data, voice and video services available in the marketplace, regardless of the transmission facility used,

is a sound and vital policy **B** both because of the immediate benefit for consumers and because of its longer-range spur to broadband investment and deployment. Here, the Commission need do no more than establish an obligation on the merged entity to provide non-affiliated ISPs connectivity to the cable platform on rates, terms and conditions equal to those accorded to affiliated service providers. (AOL, FCC, p. 4).

2. AT&T

AT&T=s policy recommendations in Canada were oriented toward a federal agency. It argued that federal regulatory authorities should not forbear regulation, which is exactly the opposite of what it now argues in the U.S.

AT&T Canada LDS submits that the application of the Commission=s forbearance test to the two separate markets for broadband access and information services supports a finding that there is insufficient competition in the market for broadband access services and the market for information services to warrant forbearance at this time from the regulation of services when they are provided by broadcast carriers. As noted above, these carriers have the ability to exercise market power by controlling access to bottleneck facilities required by other service providers. It would appear, therefore, that if these services were deregulated at this time, it would likely impair the development of competition in this market as well as in upstream markets for which such services are essential inputs. (AT&T, p. 15).

AT&T argued that vertically integrated cable and telephone facility owners possess market power and have to be prevented from engaging in anticompetitive practices. These are the very same arguments AOL made in the U.S. over two years later.

The dominant and vertically integrated position of cable broadcast carriers requires a number of safeguards to protect against anticompetitive behaviour. These carriers have considerable advantages in the market, particularly with respect to their ability to make use of their underlying network facilities for the delivery of new services. To grant these carriers unconditional forbearance would provide them with the opportunity to leverage their existing networks to the detriment of other potential service providers. In particular, unconditional forbearance of the broadband access services provided by cable broadcast carriers would create both the incentive and opportunity for these carriers to lessen competition and choice in the provision of broadband service that could be made available to the end customer. Safeguards such as rate regulation for broadband access services will be necessary to prevent instances of below cost and/or excessive pricing, at least in the near-term.

Telephone companies also have sources of market power that warrant maintaining safeguards against anticompetitive behaviour. For example, telephone companies are still overwhelmingly dominant in the local telephony market, and until this dominance is diminished, it would not be appropriate to forebear unconditionally from rate regulation of broadband access services (AT&T, p. 15).

In the opinion of AT&T Canada LDS, both the cable companies and the telephone companies have the incentive and opportunity to engage in these types of anticompetitive activities as a result of their vertically integrated structures. For example, cable companies, as the dominant provider of broadband distribution services, would be in a position to engage in above cost pricing in uncontested markets, unless effective constraints are put in place. On the other hand, the telephone company will likely be the new entrant in broadband access services in most areas, and therefore expected to price at or below the level of cable companies. While this provides some assurances that telephone companies are unlikely to engage in excessive pricing, it does not address the incentive and opportunity to price below cost. Accordingly, floor-pricing tests would be appropriate for services of both cable and telephone companies. (AT&T, pp. 16-17)

Furthermore, in the case of both cable and telephone broadcast carriers, safeguards would also need to be established to prevent other forms of discriminatory behaviour and to ensure that broadband access services are unbundled. (AT&T, p. 17).

II. THE NEED FOR OPEN ACCESS POLICY: ANALYSIS OF SUPPLY AND DEMAND FACTORS

The recommendation that government requirements for open access are necessary to promote and protect competition rests on extensive analysis of market structure. A comprehensive case was laid out by AT&T in Canada and AOL in the U.S, which rejected each of the major arguments against open access. AT&T/AOL cited at least five fundamental supply-side characteristics that support the recommendation for open access and three demand-side characteristics.

SUPPLY-SIDE

1. VERTICAL INTEGRATION

AT&T drove a very hard bargain when it came to the question of regulation of access to broadband facilities. It viewed one fundamental problem as leveraging market power from the core business of vertically integrated facilities owners who have a dominant position in an adjacent market. Thus, it advocated regulation of access not only because there was a lack of competition in the new market (broadband access), but also because there was a lack of competition in the core markets that the facilities owner dominates (cable TV service for cable operators and local exchange service for telephone companies).

> In terms of the appropriate period in which to apply the safeguards, AT&T Canada LDS is of the view that safeguards against anticompetitive behavior would need to be maintained for cable companies until competition in the provision of broadband access services has been established in a substantial portion of the market**Y**

> In the case of cable companies, there would need to be evidence that vigorous and effective competition had evolved in a substantial portion of the market for broadband access services and in their core businesses (i.e., the distribution of broadcast programming services). Moreover, in order to protect against abuse of any residual market power, safeguards should be in place, including the implementation of an effective price mechanism for basic and extended basic cable services in order to prevent instances of cross-subsidization, and provision of non-discriminatory and unbundled access to the broadband service of cable broadcast carriers. (AT&T, pp. 17**Y** 18)

> Similar considerations apply to the case of telephone companies with respect to local telephone services. Until vigorous competition in local telephony markets exists, some safeguards**Y** will be needed. (AT&T 17).

AOL described the threat of vertically integrated cable companies in the U.S. in precisely these terms.

> At every link in the broadband distribution chain for video/voice/data services, AT&T would possess the ability and the incentive to limit consumer choice. Whether through its exclusive control of the EPG or browser that serve as consumers= interface; its integration of favored Microsoft operating systems in set-top boxes; its control of the

cable broadband pipe itself; its exclusive dealing with its own proprietary cable ISPs; or the required use of its Abackbone@ long distance facilities; AT&T could block or choke off consumers= ability to choose among the access, Internet services, and integrated services of their choice. Eliminating customer choice will diminish innovation, increase prices, and chill consumer demand, thereby slowing the roll-out of integrates service. (AOL, FCC, p. 11)

2. PAUCITY OF ALTERNATIVE FACILITIES

AT&T maintained that the presence of a number of vertically integrated facilities owners does not solve the fundamental problem that nonintegrated content providers will inevitably be at a severe disadvantage. Since non-integrated content providers will always outnumber integrated providers, competition can be undermined by vertical integration. In order to avoid this outcome, even multiple facilities owners must be required to provide non-discriminatory access.

Furthermore, as noted above, every carrier that provides local access services will control bottleneck access to its end customer. This means that any connecting carriers, such as IXCs, have no alternatives available to obtain access to the end customers or the access provider, other than persuade their customers to switch to another access provider or to become vertically integrated themselves. In AT&T Canada LDS= view, neither of these alternatives is practical. Because there are and will be many more providers of content in the broadband market than there are providers of carriage, there always will be more service providers than access providers in the market. Indeed, even if all of the access providers in the market integrated themselves vertically with as many service providers as practically feasible, there would still be a number of service providers remaining which will require access to the underlying broadband facilities of broadcast carriers. (AT&T, p. 12).

AOL also argues that the presence of alternative facilities does not eliminate the need for open access.

Moreover, an open access requirement would provide choice and competition of another kind as well. It would allow ISPs to choose between the first-mile facilities of telephone and cable operators based on their relative price, performance, and features. This would spur the loop-to-loop, facilities-based competition contemplated by the Telecommunications Act of 1996, thereby offering consumers more widespread availability of Internet access; increasing affordability due to downward pressures on prices; and a menu of service options varying in price, speed, reliability, content and customer service. *(AOL, FCC, p. 14)*

Another indication of the fact that the availability of alternative facilities does not eliminate the need for open access policy can be found in AOL=s conclusion that the policy should apply to both business and residential customers. In San Francisco, the city asked whether the policy of open access Ashould apply only to residential services?@ The business sector has experienced a great deal more competition for telephone service and broadband services. DSL, which was originally intended by telephone companies as a business service, is much better suited to this market segment and market analysis indicates that cable and telephone companies are dividing this market more evenly. If ever there was a segment in which the presence of two facilities competing might alleviate the need for open access requirement, the business segment is it. AOL rejected the idea.

> Defining Aconsumers@ to include only residential customers, however, would unduly limit the fulfillment of these goals. There is no indication that the Board intended to exclude business customers from the benefits flowing from competition and choiceY The City should thus ensure nondiscriminatory open access to broadband Internet access for residential and business services alike. (AOL, pp. 1-2).

3. ESSENTIAL ACCESS FUNCTIONS

AT&T also made a much more profound argument about the nature of the integration of facilities and programming. AT&T defined access to the customer as an essential input to the delivery of information services for both cable and telephone facilities.

> AT&T Canada LDS is of the view that broadband access services are a bottleneck service. These facilities are a necessary input required by information service providers seeking to deliver their services to their end-user customers. In fact, many of these access facilities share the same bottleneck characteristics as those exhibited by narrowband access facilities, such as those which are used in the provision of local and long distance telephony services. (AT&T, p. 10)

Because of the essential nature of access, AT&T attacked the claim made by cable companies that their lack of market share indicates that they lack market power. AT&T argued that small market share does not preclude the existence of market power because of the essential function of the access input to the production of service.

> By contrast, the telephone companies have just begun to establish a presence in the broadband access market and it will likely take a number of years before they have extensive networks in place. This lack of significant market share, however, is overshadowed by their monopoly position in the provision of local telephony services.

In any event, even if it could be argued that the telephone companies are not dominant in the market for broadband access services because they only occupy a small share of the market, there are a number of compelling reasons to suggest that measures of market share are not overly helpful when assessing the dominance of telecommunications carriers in the access market**Y**

Where the market under consideration involves the provision of telecommunications access service (such as the market for broadband access services), it is more important to examine the supply conditions in the relevant market than the demand conditions which characterize that particular market. This is because telecommunications access service represents an essential input to the production process of other service providers. Therefore, even if the service provider only occupies a very small market share of the overall market for broadband access services, it is dominant in the provision of its access services because alternate providers must rely on that access provider in order to deliver their own services to the end-user subscriber. (AT&T, pp. 8, 9).

AOL also identifies the critical importance of access.

The key, after all, is the ability to use **A**first mile@ pipeline control to deny consumers direct access to, and thus a real choice among, the content and services offered by independent providers. Open access would provide a targeted and narrow fix to this problem. AT&T simply would not be allowed to control consumer=s ability to choose service providers other than those AT&T itself has chosen for them. This would create an environment where independent, competitive service providers will have access to the broadband **A**first mile@ controlled by AT&T **B** the pipe into consumers= homes **B** in order to provide a full, expanding range of voice, video, and data services requested by consumers. The ability to stifle Internet-based video competition and to restrict access to providers of broadband content, commerce and other new applications thus would be directly diminished. (AOL, FCC, p. 13)

AT&T explicitly rejects the claim that nondominant firms in the access market should be excused from open access regulation.

AT&T Canada LDS does not consider it appropriate to relieve the telephone companies of the obligation**Y** on the grounds that they are not dominant in the provision of broadband services. These obligations are not dependent on whether the provider is

dominant. Rather they are necessary in order to prevent the abuse of market power that can be exercised over bottleneck functions of the broadband access service. It should be noted that Stentor [a trade association of local telephone companies in Canada] was of the view that *new entrants in the local telephony market* should be subject to regulation and imputation test requirements because of their control over local bottleneck facilities. Based on this logic, the telephone companies, even as new entrants in the broadband access market, should be subject to similar regulatory and imputation test requirements (AT&T, p. 24, emphasis added)

4. NEW MARKETS NEED OPEN ACCESS

As indicated in the above quotes, AT&T argued for open access at an early stage of development of broadband in Canada. Thus, AT&T=s argument responds directly to the claim that the market is too new to require an open access obligation. AT&T argued that the requirement is necessary to ensure that the market develops in a competitive direction from its early stages in Canada.

AOL argued exactly the same thing in the U.S., when the market was still new, but much more highly developed. It argued that requiring open access early in the process of market development would establish a much stronger structure for a proconsumer, procompetitive market. Early intervention prevents the architecture of the market from blocking openness and avoids the difficult task of having to rebuild the market on an open bases later.

The Commission should proceed while the architecture for cable broadband is still under construction. To wait any longer would allow the fundamentally anti-consumer approach of the cable industry to take root in the Internet and spread its closed broadband facility model nationwide. Must consumers await an AMFJ for the 21st Century@?

Obliging AT&T to afford unaffiliated ISPs access on nondiscriminatory terms and conditions so that they, in turn, may offer consumers a choice in broadband Internet Access would be a narrow, easy to administer, and effective remedy. It would safeguard, rather than regulate, the Internet and the new communications marketplace. The openness it would afford is critical to a world in which as boundaries are erased between communications services and applications we ensure that consumers likewise are truly afforded choice without boundaries. (AOL, FCC, p. 18)

5. OPEN ACCESS SPEEDS DEPLOYMENT

There is a final supply-side argument that these companies have made that is critically important to the ongoing debate, which involves the impact of open access requirement on the deployment of facilities. AOL argues that open access conditions would do little to slow, and might actually speed, the development and deployment of broadband facilities, while they ensure a vigorously competitive content market.

> Open access will not unduly increase cable operator=s financial risk. A nondiscriminatory transport fee set by the cable operator would allow AT&T to recover full transport costs plus profit from each and every interconnecting provider. And AT&T=s affiliated ISP would still be free to compete **B** based on cost and quality **B** with other ISPs. As Forrester Research observed, **A**[c]able companies can make money as providers of high-speed access for other ISPs. Instead of gnashing their teeth, large cable operators should make their networks the best transport alternative for providers of all types of telecommunications services.@ According to AT&T itself, **A**the only way to make money in networks is to have the highest degree of utilization.@ Open access would allow AT&T to do just that, fostering a wholesale broadband transport business that would increase use of the cable operator=s platform, fuel innovation, and attract additional investment. (AOL, pp. 6-7)

DEMAND-SIDE FUNDAMENTALS

AT&T offered a series of observations about the nature of the demand side of the broadband market that reinforces the conclusion that an open access requirement is necessary.

1. NARROWBAND DOES NOT COMPETE WITH BROADBAND

The most fundamental observation on the demand side offered by AT&T is the fact that narrowband services are not a substitute for broadband services.

> AT&T Canada LDS notes that narrowband access facilities are not an adequate service substitute for broadband access facilities. The low bandwidth associated with these facilities can substantially degrade the quality of service that is provided to the end customer to the point where transmission reception of services is no longer possible. (AT&T, p. 12).

AT&T and the cable industry say exactly the opposite in the U.S. This is a critical point in the antitrust analysis of the AT&T-MediaOne merger. If the narrowband market is a separate market from broadband, as AT&T so clearly argued in Canada, then the concentration of broadband services that AT&T proposes to accomplish through merger in the U.S. appear to violate the antitrust laws.

Not only did AT&T reject the notion that competition for narrowband Internet service is sufficient to discipline the behavior of vertically integrated broadband Internet companies, it expressed the concern that leveraging facilities in the broadband market might damage competition in the whole content market.

> As noted above, even though the market for Internet access service generally demonstrates a high degree of competition (with the exception of co-axial cable Internet access services), the potential exists for providers who also control the underlying access to undermine the continuation of such competition. Accordingly, AT&T Canada LDS submits that safeguards against anti-competitive behaviour should be applied to the provision of information service by those broadcast or telecommunications carriers who own and operate broadband access networks. (AT&T, p. 17).

AOL raised a parallel concern. It argues that the leverage from integration could undermine the prospects for increased competition in the traditional cable industry.

> We submit that, to answer this question, the Commission should examine certain critical A meg-effects@ of the proposed AT&T/MediaOne combination. First, the FCC should consider how this merger=s video and Internet access components together would service to keep consumer from obtaining access to Internet-delivered video-programming B and thereby shield cable from competition in the video market. (AOL, FCC, p. 8)

2. SWITCHING COSTS

AT&T also made an argument in Canada on the demand-side that undercuts its claims in the U.S. that the current advantage of cable over DSL should not be a source of concern. AT&T argued that the presence of switching costs can impede the ability of consumers to change technologies, thereby impeding competition.

> [T]he cost of switching suppliers is another important factor which is used to assess demand conditions in the relevant market. In the case of the broadband access market, the cost of switching suppliers could be significant, particularly if there is a need to adopt different technical interfaces or to purchase new equipment for the home or office. Given the fact that many of the technologies involved in the provision of broadband

> access services are still in the early stages of development, it is unlikely that we will see customer switching seamlessly form one service provider to another in the near-term. (AT&T 12)

The equipment (modems) and other front-end costs are still substantial and unique to each technology. There is very little competition between cable companies (i.e. overbuilding). Thus, switching costs remain a substantial barrier to competition.

3. BUNDLING

A third demand-side problem identified by AT&T in Canada is the leverage that vertically integrated firms possessing market power in an adjacent market can bring to bear on a new market. By packaging together broadband services, particularly those over which integrated firms exercise market power, non-integrated competitors can be placed at an unfair advantage.

> [T]his dominance in the broadband access market provides cable broadcast carriers with considerable market power in the delivery of traditional broadcasting services. This dominant position in the core market for BDU (cable TV programming] services can, in turn, be used by the cable companies to leverage their position in the delivery of non-programming services, the vast majority of which will be carried over their cable network facilities.

> As broadcasting and telecommunications technologies converge, subscribers will seek to simplify their access arrangements by obtaining all of their information, entertainment and telecommunications services over a single broadband access facility. This in turn will make it more difficult for service providers to use alternate access technologies as a means of delivering service to their customers. (AT&T, pp. 8-9).

Bundling remains one of the focal points of antitrust and competitive concern in the U.S. AOL raised the bundling issue in its comments at the FCC as well.

> Second, the agency should reflect upon how this merger would enable cable to use RBOC-like structure to limit consumer access to the increasingly integrated video/voice/data communications services offered over the broadband pipe controlled by cable. And finally, the agency should recognize how these two Amega-effects@ of the merger together reinforce cable=s ability to deny consumers the right to choose: (a) between a competitive video-enhanced Internet service rather than a traditional cable service; (b) among competing cable Internet services; and (c) among competing A bundles@ of video/data/voice services that contain multichannel video. (AOL, FCC, p.

UNDERSTANDING THE PRESENT AND LOOKING TO THE FUTURE: OPEN ACCESS REMAINS NECESSARY

While AT&T might argue that conditions have changed since it so vigorously supported open access in 1997, and therefore it should not be held to those comments, AOL can make no such claim. In fact, AT&T=s analysis of the broadband market is still applicable.

First, many of the arguments it made are unaffected by changes in the industry. There are fundamental characteristics of the communications and broadband industry identified by AT&T/AOL that do not change which require open access to facilities. These are enduring characteristics of the market **B** paucity of facilities compared to content providers, access as an essential input, separate narrowband and broadband markets, switching costs, bundling -- that establish the need for a public obligation to provide open access.

Second, AT&T=s view of the likely development of alternative technologies expressed in Canada is similar to the view that many take today. The two wireline technologies that are up and running, although not fully deployed, are dominant. Cable is ahead of DSL. Wireless is farther out in the future.

> [I]t would appear that there is only a limited number of broadcast carriers that are capable of offering broadband access services. Indeed, only the cable and telephone companies appear to be positioning themselves as hybrid broadcast/telecommunications carriers at the present time. While this is not to say that other service providers such as MMDS and LMCS carriers do not have plans to launch hybrid services of their own, neither of these service providers currently offer both broadcasting and telecommunications services on a facilities basis over their networks.

> In the opinion of AT&T Canada LDS, the supply conditions in broadband access markets are extremely limited. There are significant barriers to entry in these markets including lengthy construction periods, high investment requirements and sunk costs, extensive licensing approval requirements (including the requirements to obtain municipal rights of way)**Y** Under these circumstances, the ability for new entrants or existing facilities-based service providers to respond to nontransitory price increases would be significantly limited, not to mention severely protracted (AT&T, pp. 7, 12).

Third, even where there have been positive developments in the industry to expand

alternatives, it is not clear that such changes have been or will soon be of sufficient magnitude to change the basic conclusion of AT&T=s analysis. Many analysts reach the same conclusion today about the U.S., that AT&T reached three years ago about the Canadian market. The changeable characteristics of the market that might lessen, but not negate, the need for open access, have simply not moved far enough to create a basis to contradict AT&T=s conclusion that open access is necessary. Ironically, AT&T told Canadian regulators not to speculate about the development of technologies. They were told to deal with the facts on the ground, not what might happen in the future.

> As noted above and in some of the preceding sections, the market for broadband access services is subject to rapid innovation and technological change. Indeed, the recent advances in wireless broadband delivery systems suggests that the possibility exists, at least in the long term, for a break-through in technology which could have a significant impact on the supply conditions affecting broadband access services. However, since the happening of these events is difficult to anticipate and the resulting impact on the market essentially unpredictable, it is appropriate to design policies and approaches to regulation which address the current market conditions and a need to supply safeguards in those instances where market power is present. (AT&T 15).

Any claim that the market situation has changed so much that open access is no longer necessary is totally undermined by AT&T=s continued insistence in the U.S. that telephone companies be required to make their advanced services networks available to competitors on an open access basis. AT&T continues to make exactly the same arguments about the telephone companies in the U.S. in 2000, that they made about the telephone companies in Canada in 1997.

In opposing the entry of SBC into long distance in Texas, AT&T complains about bottleneck facilities, vertical integration, bundling of services. As a result, it demands non-discriminatory access. It has simply stopped making the arguments that apply with equal force to cable companies. Needless to say, AT&T refuses to accept the same public policy obligation to provide open access to the approximately 2 million cable homes that its cable wires pass in Texas.

> Today, SWBT is exploiting its control over essential xDSL-related inputs, not only to prevent advanced services competition from AT&T and others, but also to perpetuate its virtual monopoly over the market for local voice services**Y**

> SWBT has not, in fact, complied with its statutory duties to provide nondiscriminatory access to xDSL-capable loops (47 U.S.C. s. 271(c)(2)(B)(ii)&(iv)) and the operational support systems and processes that are needed to enable Texas consumers to benefit

from a competitive market for xDSL services (47 U.S.(c)(2_(B)(ii))Y

SWBT must also have policies, procedures, and practices in place that enable AT&T (by itself, or through partners) to provide consumers with the full range of services they desire, including advanced data services. Otherwise they will not be able to purchase some services B and will therefore, be less inclined to obtain any services B from AT&T. Thus, SWBT=s inability (or unwillingness) to support AT&T=s and other new entrants= xDSL needs not only impairs competition for advanced services but also jeopardizes competition for voice services as well.

As both the Commission and Congress have recognized, high-speed data offerings constitute a crucial element of the market for telecommunications services, and, because of their importance, the manner in which they are deployed will also affect the markets for traditional telecommunications. Many providers have recognized the growing consumer interest in obtaining Abundles@ of services from a single provider. Certainly SBC, with its $6 billion commitment to A Project Pronto@ has done so. AT&T is prepared to compete, on the merits, to offer A one-stop shopping@ solutions. Competition, however, cannot survive if only a single carrier is capable of providing consumers with a full package of local, long distance, and xDSL services. (AT&T SBC Comments, pp. 9Y 10Y 11Y 12)

Now that AT&T has bought a stake in the majority of cable wires in the country, it excludes cable programming and cable-based broadband Internet from the mix of services that must be included in the bundle. It is willing to compete on the A merits to offer one-stop shopping@ by demanding open access to other people=s wires, but it will not allow the same terms and conditions for others to compete over its wires.

AOL, however, did not hesitate to point out the powerful anticompetitive effect that integrating video services in the communications bundle could have. The video component of the bundle is certainly one of the most important of the components.

The second A mega-effect@ of this proposed merger is of even broader potential consequence. With this merger, AT&T would take an enormous next step toward its ability to deny consumers a choice among competing providers of integrated voice/video/data offerings B a communications marketplace that integrates, and transcends, an array of communications services and markets previously viewed as distinct. (AOL, FCC, pp. 9-10).

D, CONCLUSION

The concept of essential functions in network industries that provide market power over end user customers even where several access providers are available is extremely important. These are the new choke points in the Internet economy. Because of switching costs, convergence of access, and bundling of products this is a fundamental observation about the nature of these industries. These demand side structural problems interact with the observation that facilities providers will always be far fewer in number than content providers with the inevitable result that absent an open access obligation many content providers will be at a severe disadvantage.

AT&T-AOL were fundamentally correct in concluding that even without vertical integration and dominance, access is an essential function that presents a significant problem for public policymakers who are concerned about preserving the remarkably dynamic innovation and competition of today=s Internet. In the information economy where the smooth flow of information is so critical, these choke points may call for even greater commitment to ensure open access than has historically been the case, because their importance imbues them with even greater potential for the abuse of market power.

> Where a broadband access provider is neither vertically-integrated nor dominant with respect to telecommunications or broadcasting service, but is offering broadband access services then the requirement for third party access tariff, CEI and other non price safeguards should apply. (AT&T, p. 29)

It was quite clear in the formulation of these two Aunaffiliated@ companies that broadband access services should be available on non-discriminatory terms, even where there is an absence of vertical integration and dominance. Through this analysis, they arrived at an entirely reasonable public policy formulation that is consistent with our view that communications and transportation networks have always been and should always be subject to a requirement to be open because of the critical role they play.

III. IMPLEMENTING PUBLIC POLICY

OVERVIEW OF APPROACHES AND GOALS

AOL=s proposed rule for San Francisco typifies its approach to light handed open access requirements in which the local franchising authority creates the obligation and then allows private parties to work out the details with city enforcement as a backstop.

> *Section 1: Non-discrimination requirements:* Franchisee shall immediately, with respect to this franchise, provide any requesting Internet Service Provider access to its broadband Internet transport services (unbundled from the provision of content) on rates, terms and conditions that are at least as favorable as those on which it provides such access to itself, to its affiliates, or to any other person. Such access shall be provided at any point where the Franchisee offers access to its affiliate. Franchisee shall not restrict the content of information that a consumer may receive over the InternetY
>
> *Section 2: Private Right of Action:* Any Internet Service Provider who has been denied access to a Franchisee=s Broadband Internet Access Transport Services in violation of this Ordinance has a private cause of action to enforce its rights to such access.
>
> *Section 3 Enforcement Rights of City and County:* In addition to any other penalties, remedies or other enforcement measures provided by Ordinances or state or federal laws, the City and County may bring suit to enforce the requirements of this Ordinance and to seek all appropriate relief including, without limitation, injunctive relief. (AOL, pp. 2-3.)

AOL made essentially the same recommendation to the FCC.

> The essence of an open access policy is thus competition, not regulation. Open access would create a competitive check on conduct B a far more preferable option than a behavioral check requiring constant step-by-step scrutiny of a cable operator=s dealing with every provider of content or new applications to make sure that the company=s conduct doesn=t skew its network in favor of affiliated service providers.
>
> This approach does not require imposition of legacy common carrier regulation. The model for such early, targeted safeguarding is drawn directly from the existing cable regulatory framework, but its policy foundation cuts across all FCC regulation. Any

> cable television system operator that provides any Internet service provider access to its broadband cable facilities would have to provide a requesting ISP comparable access to its facilities on rates, terms, and conditions equal to those under which it provides access to its affiliate or to any other person. (AOL, FCC, p. 14).

Commenting before a federal body with much broader regulatory powers, AT&T proposed a much more vigorous regime of regulation.

> Given the incentives and opportunities available to broadcast carriers to abuse their market power and control over bottleneck facilities, AT&T Canada LDS has recommended the adoption of a number of safeguards in order to prevent instances of anti-competitive behaviour**Y**

> implementation of a cost based price floor to protect against below cost pricing of broadband access services;
>
> implementation of a cost-based price ceiling with a limited mark-up to prevent excessive pricing of access services in uncontested markets;
>
> implementation of a third party access tariff, allowing for non-discriminatory and unbundled access to broadband bottleneck facilities, as well as comparably efficient interconnection and associated non-price safeguards;
>
> implementation of price caps, accounting separations and other safeguards against anti-competitive cross-subsidization; and
>
> imputation of appropriate third party access tariffs to value added information services providers by broadcast carriers. (AT&T, p. iii)

It is interesting to note that the provisions of the Telecommunications Act of 1996 to which AT&T points when it demands open access to xDSL in the U.S. are almost identical to the provisions that AOL proposed in the San Francisco proceeding. This makes it quite clear what entities that do not own essential access wires need to enter markets.

> s. 271 (c)(B) COMPETITIVE CHECKLIST**C**Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251 (c)(3) and 252 (d) (2)Y

(iv) Local loop transmission from the central office to the customer=s premises, unbundled from switching or other services.

s. 251 (c)(3) UNBUNDLED ACCESS B the duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service. (Telecommunications Act of 1996)

It is also interesting to note that AT&T embeds the obligation to provide nondiscriminatory access and unbundling into the permanent conditions in the industry structure. That is, it recommends the relaxation of detailed regulation only after vigorous competition develops in both the access market and the adjacent core markets where facilities owners have market power. However, even after this deregulation, AT&T recommends the continuance of A safeguards to ensure that broadband access services continue to remain available from the telephone [and] cable companies on a non-discriminatory and unbundled basis.@ (AT&T, p. iii)

While AT&T Canada LDS considers that forbearance from the regulation of broadcast carrier access and value-added information services is not warranted at this stage in the development of the broadband market, conditional forbearance may be warranted when certain barriers to entry are removed in the cable distribution and local telephony markets. With respect to the broadband services provided by telecom broadcast carriers, the following safeguards should be treated as preconditions to any relaxation of the rules applicable to these carriers:

local competition issues are resolved and the terms and conditions for local entry have been successfully implements such that practical alternatives to the supply of local services exist in the local market;

the broadband tracking requirements established in Decision 95-21 have been implemented and reports from the telephone companies satisfy the Commission that treatment of

broadband investment and expenses are appropriate;

price cap regulation has been implemented in such a manner as to preclude telephone companies from recouping broadband investment costs from utility services: and

the establishment of safeguards to ensure that broadband access services continue to remain available from the telephone companies on a non-discriminatory and unbundled basis.

With respect to the broadband services provided by cable broadcast carriers, the following safeguards should be treated as pre-conditions to any relaxation of the rules applicable to these carriers:

a demonstration that vigorous and effective competition has evolved in a substantial portion of the market for broadband access services and in the market for BDU services:

the implementation of an effective price cap mechanism for basic and extended basic services in order to prevent instances of cross-subsidization; and

the establishment of safeguards to ensure that broadband access services continue to remain available from the cable companies on a non-discriminatory and unbundled basis. (AT&T, p. ii, emphasis added)

AT&T=s regulatory proposal goes far beyond anything being considered for cable operators in the U.S., although wireline telephone companies are subject to exactly this type of regulation in their high speed services. Indeed, as noted, AT&T continues to push for regulation of telephone companies, including their advanced DSL services. In fact, one of the more important implications of the AT&T analysis in Canada is that the cable and telephone industries should be subject to similar obligations. In the U.S. it vigorously defends asymmetric regulation, with its property being unregulated.

Whether through AOL=s private negotiations backed up by a public obligation or AT&T=s direct regulation, the objectives of both companies were generally the same. The standards by which we should measure the quality of open access are the conditions that AOL and AT&T stipulated that facilities owners should grant to non-affiliated ISPs when they were non-affiliated ISPs themselves.

SPECIFICATION OF NONDISCRIMINATORY

ACCESS CONDITIONS

In order to analyze the complex issue of nondiscriminatory access to the broadband facilities, CFA has adopted the analytic approach presented in Table 1. It identifies three broad areas of concern and about two dozen specific practices. AT&T and AOL provided extensive concrete discussions of these potential problems.

In addition to pricing safeguards, AT&T advocated a number of non-price safeguards to accomplish three general goals of open access.

Such safeguards are necessary to ensure that competing service providers:

> (1) are able to gain comparable access to network bottlenecks; (2) are protected against abuse of confidential information which is provided to the bottleneck access provider; and (3) are not otherwise disadvantaged in the market by the bottleneck access provider through, for example, the negotiation of exclusive or preferential agreements with other service providers. (AT&T, p. 22)

C. ARCHITECTURE: TECHNOLOGY BIAS

The first source of potential discrimination lies in the architecture of the network. It involves the technical capabilities of the network that could disadvantage independent ISPs in

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The framework for analysis is based on the paradigm presented by Larry Lessig, *Code and Other Laws of Cyberspace* (New York, Basic Books, 1999) as described in Mark Cooper, ACreating Open Access to the Broadband Internet,@ *Briefing: Can We Preserve the Internet as We Know It? Challenges to Online Access, Innovation, Freedom and Diversity in the Broadband Era* (Dec. 20, 1999) and AOpen Access to the Broadband Internet: Overcoming Technological and Economic Discrimination in Proprietary Networks,@ *University of Colorado Law Review*, forthcoming.

TABLE 1

TECHNICAL AND ECONOMIC SOURCES OF DISCRIMINATION IN PROPRIETARY BROADBAND NETWORKS

ARCHITECTURE:

TECHNOLOGY BIAS

INTERCONNECTION

Physical connection

Compatibility

FILTERING

Committed Access Rate

Preferential Queuing

STRUCTURE

Restricted backbone choice

Precedence

Collocation

Replication

NORMS:

SERVICE RESTRICTIONS

PROVIDERS

Speed of service

THE MARKET:

BUSINESS LEVERAGE

INFORMATION GATHERING

PRICING

Price Squeeze

Cross-subsidy

Pricing Options

PRODUCT BUNDLING

CUSTOMER RELATIONSHIP

Marketing

Billing

Boot screen

Time of downstream video

CONSUMERS

Limits on upstream traffic

Prohibitions on server set-up

Prohibitions on local area networking

the activities that they are allowed to conduct. The architecture of the network, controlled by the proprietor, can be configured and operated to restrict the ability of the independent ISP, while it does not restrict the ability of an affiliated ISP. Technology bias can take several forms, including interconnection, structure, and flow control. We have already noted that AOL urged the FCC to act early in the development of the industry to prevent it from embedding anti-consumer characteristics into its architecture.

1. INTERCONNECTION

Interconnection involves allowing ISPs to establish a connection between networks. These connections must be compatible if they are to be meaningful. The cable industry=s existing exclusive contracts do not allow independent ISPs to connect directly to the consumer. AT&T Canada was very concerned about exclusive and preferential deals.

> A prohibition on preferred agency or exclusive arrangements between vertically-integrated broadband access providers and integrated or affiliated information service providers which contain discriminatory access provision, either in terms of price or quality of access. (ATT, p. 23)

It is important to recognize that mere physical interconnection and protocol support are only very minimum conditions that must be met to ensure access to customers. They are necessary, but not sufficient, conditions. AOL described interconnection in some detail.

> Access: The term Aaccess@ means the ability to make a physical connection to cable company facilities, at any place where a cable company exchanges consumer data with any Internet service provider, or at any other technically feasible point selected by the requesting Internet service provider, so as to enable consumers to exchange data over such facilities with their chosen Internet service provider (AOL, p. 2).

There are at least three possible network designs that allow for open access. These include:

policy-based routing, which routes packets to the appropriate ISP using the source IP address as the unique identifier;

virtual private networks (VPNs) and IP tunnels, which create virtual dedicated connections over the HFC network between the customer and the ISP (a solution appropriate to routed (layer 3); and

Point-to-Point Protocol over Ethernet (PPPoE) encapsulation, which is a protocol analogous to commonly employed designs for dial-up (a solution appropriate to bridged (layer 2) access networks).

Each of these options has its own unique set of advantages and disadvantages. The appropriateness of each option varies depending on the type of cable system (i.e. large or small, multiple nodes vs. single node) and the networking architecture being addressed. (AOL, p. 7-8)

AT&T uses the term Comparably Efficient Interconnection (CEI) to describe interconnection in the broadband market.

More specifically, in order to effectively compete with broadcast carriers in the provision of non-programming services, competitors must be able to provide end users with equivalent services at equal or lower prices. Therefore, in providing non-discriminatory access to their broadband networks, broadcast carriers must allow competitors to access their broadband distribution network in the most efficient manner possible. For example, competitors must have the option to specify the point of interconnection as either the headend, the drop, inside wire, or any combination thereof. This concept is known as Comparably Efficient Interconnection (CEI) and refers to the principle of providing competitors with access to the broadband network on terms that are technically and economically equivalent to those provided by the broadcast carrier to itself. Under CEI, the interconnection provided must be equivalent in terms of scope, quality and price but may vary by type of competitive entity. (AT&T, pp. 25-26)

AT&T also expressed a concern about standards and their management.

> To the extent that standards are developed for interfacing with broadband access services, the carriers who provide these services should not be permitted to implement any non-standard, proprietary interfaces, as this would be contrary to the development of an open network of networks. In addition, any new network or operational interface that is implemented by a broadband access provider should be made available on a non-discriminatory basis. (AT&T, p. 23).

2. STRUCTURE

Structure involves the deployment of physical facilities in the network. The proprietary network owner can seriously impair the ability of independent ISPs to deliver service by restricting their ability to deploy and utilize key technologies that dictate the quality of service. Structure determines how facilities are deployed and the effect that deployment has on the quality of service. Substantial discrimination can result from forcing independent ISPs to connect to the proprietary network in inefficient or ineffective ways or giving affiliated ISPs preferential location and interconnection. The quality of service of independent ISPs can be degraded.

The ability to deploy facilities to ensure and enhance the quality of service will be particularly important in the third generation of Internet service development. The multimedia, interactive applications that will distinguish the next phase of the Internet are particularly sensitive to these aspects of quality, much more so than previous applications.

> Of course, allowing a single entity to abuse its control over the development of technical solutions B particularly when it may have interests inconsistent with the successful implementation of open access B could indeed undermine the City=s policy. It is therefore vital to ensure that unaffiliated ISPs can gain access comparable to that the cable operators choose to afford to its cable-affiliated ISP. (AOL, p. 8).

3. FLOW

Flow control involves the filtering of the flow of information. Even though networks are interconnected, there is still the possibility of discriminating against some of the data that flows through the Internet. Simply put, the technology allows pervasive discrimination against external, unaffiliated service providers.

> Of course, it is implicit in the open access resolution that non-discriminatory access for multiple ISPs extends to all relevant aspects of the technical and operational infrastructure, so that all business system interfaces will be open to all ISPs and

performance levels will not favor the affiliated ISP. (AOL, p. 7)

> It is important to confirm that the cable operator must provide equal treatment for local content serving (caching or replication) that the affiliated and nonaffiliated ISPs can provide, specifically, no firewalls, protocol masking, extra routing delays or bandwidth restrictions may be imposed in a discriminatory manner. (AOL, p. 9)

D. NORMS: SERVICE RESTRICTIONS

The second source of potential discrimination involves behavioral norms. The network owner can place restrictions on how nonaffiliated service providers can use the network. As long as the network owner is also a direct competitor of the independent ISP, concerns about restriction being imposed to gain competitive advantage will persist. Restrictions that are explained as necessary for network management may be viewed as driven by business motives, rather than technical considerations, by independent ISPs. These limitations can be applied to either service providers or consumers.

> In a last mile shared environment, proper network and bandwidth management might possibly require certain limitations on data transmission. However, content- or service-specific restrictions can be both over- and under-inclusive **B** and most of all, anticonsumer. Limitations on video streaming, for example, protect cable**:**s traditional video programming distribution business. TCI admitted early on, its 10-minute cap is a **A** restriction which we imposed on @Home so that we were the determiner of how stream video works in our world**Y** [and] so that [we] determined [our] future in the area of streaming video. Any legitimate network management policies must be free of such anticompetitive intent and effect. (AOL, p. 10)

E. BUSINESS LEVERAGE

Open access cannot ignore business reality. If the network owner inserts himself in the relationship between the customer and the independent ISP in such a way as to ensure that its affiliated ISP has a price, product or customer care advantage, then competition between ISPs will be undermined. This gives rise to the third category of discrimination issues, which involves the market. The potential anticompetitive problem is the abuse of business leverage.

1. INFORMATION

In order to manage the network and effectuate the service prohibitions discussed above,

the network owner must engage in intensive monitoring of individual activity and gathering of information. The proprietary network owner must identify flows of data. Needless to say, this raises business and competitive concerns. The gathering of all that information places the network owner in a powerful position *vis-à-vis* competitors and consumers. The detailed control of the network confers an immense information advantage on the system operator. Because of the conflict of interest created by the vertical integration of facilities and content, the potential for competitive abuse of information is substantial. It is an advantage that is evident to those in the industry

> Confidential treatment of information provided by service providers to broadband access carriers that are vertically-integrated[Y] Broadband access providers that are affiliated with or have joint marketing arrangements with broadband service providers should also be required to enter into non-disclosure agreements affording these latter parties the same level of confidential treatment[Y] (ATT, p. 23)

2. PRICING

The most critical business issue is a potential price squeeze that can be placed on independent programmers and service providers by the closed business model. By controlling a bottleneck, network owners can place price conditions on independent content providers that undermine their ability to compete. Both AOL and AT&T appear to want a separate, wholesale transport service to be made available.

> Broadband Internet Transport Services- The term >broadband Internet access transport services@ means broadband transmission of data between a user and his Internet service provider=s point of interconnection with the broadband Internet access transport provider=s facilities. (AOL, p. 3)

In Canada, AT&T insisted that tariffs be set subject to clear conditions and filed. The central goal was to avoid the problem of cross subsidy.

> Accordingly, the cable companies and telephone companies should be required to file tariffs for approval of their broadband access services and to include in such applications evidence that the rate is compensatory.

> Cross-subsidization is an issue for vertically integrated carriers particularly where the broadband service (including access) is not provided on an arm=s length basis. The Commission has required telephone companies to maintain an accounting separation for

their broadband activities and to provide adequate tracking reports. (AT&T, pp. 19, 22)

In the U.S., AT&T has now offered to make transport services available at a price that is, presumably, less than it charges its customers for transport and content. That price remains to be negotiated, however, and the principles for arriving at a reasonable price are not stated. The potential for cross subsidy and discrimination is shifted, not eliminated, by this concession. In the context of the more regulatory model advocated by AT&T in Canada, it was able to specify what would constitute reasonable rates.

> cost-based rates to prevent vertically-integrated access providers from engaging in predatory pricing;
>
> limits on the level of mark-up over cost with respect to cable companies= broadband access services;
>
> unbundling and non-discriminatory access in the price of information services of all broadcast carriers.
>
> imputation of the tariffed rates for broadband access in the price of information services provided by vertically-integrated broadcast carriers;
>
> price caps in core markets where vertically-integrated carriers are dominant; and
>
> investment and expense tracking as a further check against cross subsidization. (AT&T, p. 21)

> In the case of cable companies, the implementation of an appropriately designed price cap regime could provide some protection against cross-subsidizationY Furthermore, if in addition to price caps, the Commission considers it necessary to insulate basic cable subscribers from cross-subsidizing cable companies= other broadband activities as common carriers, it could implement accounting separation and tracking requirements for cable companies. (AT&T, p. 22)

AOL worries about AT&T in the U.S. offering Aone click access@ to the Internet without a price difference. This forces independent service providers to subsidize the content of the affiliated ISP.

Provided that the City establishes the right policy B allowing the consumer to choose

any ISP they want without being required to pay for or go through the cable-affiliated ISP **B** then there are many technical solution available to broadband providers and no need for the City to mandate any particular approach. (AOL, p. 7)

Beyond the cross subsidy question, in the U.S. the whole idea of a wholesale transport tariff remains up in the air. AT&T has steadfastly resisted the basic idea of entering into commercial relationships with ISPs and allowing the ISP to have the only relationship to the customer.

However, the pricing standards to which AT&T points in its efforts to obtain nondiscriminatory access to xDSL technology from local telephone companies in the U.S. embody these fundamental principles of cost-based, nondiscriminatory prices for unbundled services.

s. 252 (d) PRICING STANDARDS. **B**

INTERCONNECTION AND NETWORK ELEMENT CHARGES. **B** Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section **B**

shall be **B**

based on the cost (determine without reference to a rate of return or other rate-based proceeding) of providing the interconnection or network elements (whichever is applicable), and

nondiscriminatory, and

(B) many include a reasonable profit.

(2).. [A] State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless B

such terms and conditions for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carriers network facilities of calls that originate on the network facilities of another carrier; and

such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls. (Telecommunications Act of 1996)

3. BUNDLING

As noted above, in Canada AT&T expressed concerns about an incumbent monopolist selling video Abroadcast@ services or local telephone services and planning to sell bundles of A broadband services.@ In this regard a fundamental issue arises over what independent ISPs will be allowed to sell and how consumers will be allowed to buy services. Cable TV=s bundling of programming has long been a source of concern. If cable owners leverage bundles with Internet and cable service, independent ISPs will be at a severe disadvantage.

AT&T proposed principles to govern bundling raise concerns in two regards. On the one hand, it recommended unbundling of service elements. On the other hand, it recommended that the unaffiliated content provider be allowed to resell (and therefore bundle) the cable programming B i.e., to create a complete bundle.

> Because broadcast carriers exercise control over bottleneck facilities, they have both he incentive and the opportunity to bundle these facilities with their other services and offer the entire package to their customers for a single priceY [T]he Commission concluded that the bundling of monopoly service elements with competitive service elements is generally appropriate subject to three conditions:

1) the bundled service must cover its cost, where the cost for the bundled service includes:

   the bottleneck component(s) Acosted@ at the tariffed rate(s) (including, as applicable, start-up cost recovery and contribution charges); and

   the Phase II causal costs for components not cover in a) above;

competitors are able to offer their own bundled service through the use of stand-alone tariffed bottleneck components in combination with their own competitive elements;

resale of the bundled service permitted**Y**

In the absence of such a requirement, broadcast carriers will be able to engage in strategic and anti-competitive pricing behaviour arising directly out of their dominant position in the access market. (AT&T, pp. 27-28)

What AT&T had identified as a powerful lever in the marketplace, control over the core product, it sought to neutralize by requiring unbundling and resale.

AT&T Canada LDS submits that broadcast carriers should not be permitted to bundle their broadcast and telecommunications service until the Commission has established rules which permit the unbundling and resale of BDU services. Furthermore, to the extent that the unbundling and resale of BDU services is tied to entry of the telephone companies into the BDU market, no telephone company should be permitted to bundle BDU service with its local telephone service until all of the issues relating to unbundling and resale of these service have been resolved by the Commission. (AT&T, p. 28)

The question of how and what independent ISPs will be able to market to customers remains a bone of contention between AT&T in the U.S. and the unaffiliated ISPs.

IV. CONCLUSION

The Aunaffiliated@ AT&T/AOL indictment of a vertically integrated, highly concentrated market clearly applies to the current situation in the U.S. and will likely continue to for the foreseeable future. The discussion of demand-side problems points to issues that are long term

in nature. The insightful discussion of network access as an essential function for communications technologies establishes the need for open access on an enduring footing. The recommendation by AT&T that the federal governments in Canada not forbear from regulation was correct in 1997, as it was in 1999, when AOL made a similar recommendation in the U.S. That conclusion applies to the U.S. today as a matter of public policy.

What AT&T and AOL said as Aunaffiliated@ companies has even greater importance for other Aunaffiliated entities.@ Even as non-facilities owners, AT&T and AOL were still very large and powerful corporations. Their analysis makes a strong case that the problems facing unaffiliated ISPs are large and real. Their frank discussion of the potential problems and the specificity with which they offered solutions should be a wake up call to policy makers. All but the most powerful ISP are likely to fare very badly in a commercial setting where discriminatory access is not firmly rejected.

It is obvious, however, that in the terms of the U.S. debate over open access, the remedies that AT&T proposed in Canada are well beyond what is being considered in the U.S. for cable TV. Telephone companies in the U.S. are under legal obligations that match the array of regulations AT&T advocated for cable TV and telephone companies in Canada. No one in the U.S. is advocating or contemplating such a heavy handed regulatory approach for cable. AOL=s light-handed approach, with government triggering private negotiations and backstopping the process, has received considerable attention. It has been adopted in a number of communities.

Combining the defense of open access with AOL=s description of the necessary policy elements to ensure nondiscrimination through light-handed regulation presents a complete and compelling package. Public policy makers can readily adopt AOL=s recommendations of a few months ago to ensure that unaffiliated ISPs, who are unable to buy broadband wires, will have a reasonable chance of competing in the broadband marketplace that AOL believes will be the dominant form of communication in the century ahead.

AT&T=s much more detailed road map to non-discriminatory access could be useful, however, in providing guidelines and benchmarks as private negotiators and the courts develop a means to understand the issues they need to be on the lookout for as negotiations proceed. The long debate over open access has produced some key barometers of open access.

Comparably efficient interconnection, with the identification of several options for physical and virtual interconnection, a list that can hopefully be expanded.

Open standards with change management.

ISP neutral network management.

Minimum content and service restriction, consistent with neutral network management.

Performance parameters, including a list of services to be made available and practices to be avoided.

Confidentiality of competitively sensitive information and protection against abuse of such information by vertically integrated broadband service providers.

A wholesale relationship between unaffiliated ISPs and vertically integrated service providers from whom the independents wish to purchase facilities.

Rates for transport service that are subsidy free and not anticompetitive.

Bundling and marketing provisions that prevent the abuse of leverage over monopoly services.

At the same time, AOL=s desire to make open access as efficient as possible by using a public obligation to trigger private negotiations over the details of open access is a valid process. Ironically, the Telecommunications Act of 1996, to which AT&T points in its demand for open access to telephone company xDSL services, had a negotiation and arbitration procedure in place to attempt to have private parties implement. AT&T=s complaints about the Baby Bells reluctance to open their markets only makes it clear that obstinate corporations can make the process difficult, but that does not obviate the need for the process. The obligation to negotiate and recourse to legal authority for redress drives the process forward. Without the public obligation, there is little chance that open access will be provided for those who need it most, the smaller niche players and innovative start ups, who have defined the special nature of the Internet.

Early in the twentieth century, as the telephone was just starting its evolution to the dominant means for people and businesses to communicate at a distance, AT&T first articulated the concept of universal service. While the motivation for and impact of that commitment have been hotly debated, there is no doubt that it deeply affected the development of public policy throughout the entire century.

As we begin the AInternet Century,@ there is clearly a need for a new balance between the public and private roles in the network of networks that is the Internet. It is unfortunate that as the remarkable potential of a broadband Internet began to emerge, the dominant technology appears to be one that had excused from an open access obligation by Congress for its core service. It would have been encouraging if, in the initial commercial convergence of the Internet

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Consumer Federation of America, *A Historical Perspective and Policies for the Twenty-First Century* (Washington, D.C., 1997).

and the cable TV industry, the open values of the Internet had proven dominant. Unfortunately, it appears that the two new giants of the broadband industry have yet to overcome the closed business model and antigovernment rhetoric of ›one of America=s most enduring monopolies.= What they said before they bought their own wires should carry special weight with policy makers who are concerned about keeping the Internet open.

Lessig=s argument in *Code* raises a broader set of concerns about the threats to the openness of the Internet and clearly believes a new balance must be struck to preserve that openness.

Press Statement, U.S. Department of Justice, *Primestar Merger*